

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

STEVEN BRAUNSTEIN,

Petitioner,

vs.

STATE OF NEVADA, *et al.*,

Respondents.

2:07-cv-0014-RLH-GWF

ORDER

This action proceeds on a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, by petitioner Steven Braunstein, a Nevada prisoner. Before the Court is respondents' answer (docket #103) and petitioner's reply (docket #110). Petitioner has also filed a motion for appointment of counsel (docket #109) and for summary judgment (docket #113). Because the petition will be denied on its merits by this Order, the motion for counsel and for summary judgment shall be denied as moot.

I. Procedural History

Petitioner was convicted, after a jury trial, in the Eight Judicial District Court for Clark County of two counts sexual assault with a minor under fourteen years of age. Exhibits 1.¹ Petitioner was sentenced to two terms of life imprisonment with parole eligibility in twenty years.

¹ The exhibits cited in this order in the form "Exhibit ____," are those filed by respondents in support of their first motion to dismiss the petition for writ of habeas corpus, and are located in the record at docket #64.

1 *Id.* A judgment of conviction was entered on March 17, 2000. *Id.* Petitioner moved for a new trial
2 or in the alternative for the court to strike two of the four jury verdicts. Exhibit 2. The jury had
3 found petitioner guilty of both sexual assault and the lesser included offenses of lewdness with a
4 minor. *Id.* The state district court denied the motion, but ordered that the lesser offense verdicts be
5 stricken. Exhibit 3.

6 Petitioner appealed, alleging (1) the trial court erred in allowing the state to introduce
7 evidence regarding a previous unrelated incident at trial; (2) the trial court erred in allowing the state
8 to introduce hearsay evidence regarding the victim's alleged statements; (3) the trial court erred in
9 not granting the motion for new trial; and (4) the prosecution failed to present sufficient evidence to
10 convict the petitioner. Exhibit 6. The Nevada Supreme Court affirmed the judgment of conviction.
11 Exhibit 7.

12 Petitioner then filed a state habeas corpus petition on April 18, 2002, alleging
13 approximately twenty-two grounds for relief. *Id.* Thereafter, he filed several amendments to the
14 petition adding seven new grounds for relief. Exhibits 8- 11. The state district court denied the
15 petition, and petitioner appealed that denial. Exhibit 12. The Nevada Supreme Court affirmed the
16 lower court's denial. Exhibit 13.

17 Petitioner mailed a federal habeas corpus petition to this Court on January 17, 2007
18 (docket #14). Respondents moved for a more definite statement (docket #40). This Court granted
19 the motion for a more definite statement, and ordered petitioner to file an amended petition (docket
20 #59). Petitioner filed a second amended petition (docket #61). Respondents moved to dismiss the
21 petition (docket #63) and petitioner ultimately abandoned grounds one (b) and (c), three (e), (f), (h),
22 (l), (n), four and five which were found to be unexhausted (dockets #81 and #95).

23 Respondents filed their answer and petitioner replied. Petitioner objects to parts of
24 the respondents' synopsis of the facts. However, that synopsis is not part of the analysis contained
25 herein and any facts discussed or considered by the court are derived directly from the record. Based
26 on the following analysis, the claims raised in the petition are without merit and shall be denied.

1 **II. Discussion**

2 A. AEDPA

3 28 U.S.C. §2254(d), a provision of the Antiterrorism and Effective Death Penalty Act
4 (AEDPA), provides the standards of review that this Court applies to the petition in this case:

5 An application for a writ of habeas corpus on behalf of a person in custody
6 pursuant to the judgment of a State court shall not be granted with respect to any
7 claim that was adjudicated on the merits in State court proceedings unless the
8 adjudication of the claim --

9 (1) resulted in a decision that was contrary to, or involved an
10 unreasonable application of, clearly established Federal law, as
11 determined by the Supreme Court of the United States; or

12 (2) resulted in a decision that was based on an unreasonable
13 determination of the facts in light of the evidence presented in the
14 State court proceeding.

15 28 U.S.C. §2254(d).

16 A state court decision is contrary to clearly established Supreme Court precedent,
17 within the meaning of 28 U.S.C. §2254, “if the state court applies a rule that contradicts the
18 governing law set forth in [the Supreme Court’s] cases” or “if the state court confronts a set of facts
19 that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives
20 at a result different from [the Supreme Court’s] precedent.” *Lockyer v. Andrade*, 538 U.S. 63 (2003)
21 (*quoting Williams v. Taylor*, 529 U.S. 362, 405-06 (2000), and *citing Bell v. Cone*, 535 U.S. 685, 694
22 (2002)).

23 A state court decision is an unreasonable application of clearly established Supreme
24 Court precedent, within the meaning of 28 U.S.C. §2254(d), “if the state court identifies the correct
25 governing legal principle from [the Supreme Court’s] decisions but unreasonably applies that
26 principle to the facts of the prisoner’s case.” *Lockyer v. Andrade*, 538 U.S. at 74 (*quoting Williams*,
529 U.S. at 413). The “unreasonable application” clause requires the state court decision to be more
than incorrect or erroneous; the state court’s application of clearly established law must be
objectively unreasonable. *Id.* (*quoting Williams*, 529 U.S. at 409). In determining whether a state

1 court decision is contrary to federal law, this Court looks to the state courts' last reasoned decision.
2 *See Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991); *Shackleford v. Hubbard*, 234 F.3d 1072, 1079
3 n.2 (9th Cir. 2000), *cert. denied*, 122 S.Ct. 324 (2001)

4 With respect to pure questions of fact, "a determination of a factual issue made by a
5 State court shall be presumed to be correct," and the petitioner "shall have the burden of rebutting
6 the presumption of correctness by clear and convincing evidence." 28 U.S.C. §2254(e)(1). If there
7 is no reasoned decision upon which the Court can rely, then it must make an independent review of
8 the record to determine whether the state court clearly erred in its application of controlling federal
9 law. *See Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir.2000).

10 B. Assistance of Counsel

11 Most of petitioner's claims for relief are based upon the alleged ineffectiveness of his
12 trial and appellate counsel. In *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970), the Supreme
13 Court declared that "the right to counsel is the right to the effective assistance of counsel." In
14 *Strickland v. Washington*, 466 U.S. 668 (1984), the Court established the standards by which claims
15 of ineffective counsel are to be measured. In *Strickland*, the Court propounded a two prong test; a
16 petitioner claiming ineffective assistance of counsel must demonstrate (1) that the defense attorney's
17 representation "fell below an objective standard of reasonableness," and (2) that the attorney's
18 deficient performance prejudiced the defendant such that "there is a reasonable probability that, but
19 for counsel's unprofessional errors, the result of the proceeding would have been different."
20 *Strickland*, 466 U.S. at 688, 694.

21 Regarding the first prong -- commonly known as the "effectiveness prong" -- the
22 *Strickland* Court expressly declined to articulate specific guidelines for attorney performance beyond
23 generalized duties, including the duty of loyalty, the duty to avoid conflicts of interest, the duty to
24 advocate the defendant's cause, and the duty to communicate with the client over the course of the
25 prosecution. *Id.* Defense counsel's duties are not to be defined so exhaustively as to give rise to a
26 "checklist for judicial evaluation ... [because] [a]ny such set of rules would interfere with the

1 constitutionally protected independence of counsel and restrict the wide latitude counsel must have
2 in making tactical decisions.” *Id.*

3 The *Strickland* Court instructed that review of an attorney’s performance must be
4 “highly deferential,” and must adopt counsel’s perspective at the time of the challenged conduct, in
5 order to avoid the “distorting effects of hindsight.” *Id.* at 689. A reviewing court must “indulge a
6 strong presumption that counsel’s conduct falls within the wide range of reasonable professional
7 assistance ... [and] the [petitioner] must overcome the presumption that ... the challenged action
8 might be considered sound trial strategy.” *Id.* (citation omitted).

9 Construing the Sixth Amendment to guarantee not effective counsel *per se*, but rather
10 a fair proceeding with a reliable outcome, the *Strickland* Court concluded that demonstrating that
11 counsel fell below an objective standard of reasonableness alone is insufficient to warrant a finding
12 of ineffective assistance. In order to satisfy *Strickland*’s second prong, the defendant must show that
13 the attorney’s sub-par performance prejudiced the defense. *Id.* at 691-92. The test is whether there
14 is a reasonable probability that, but for the attorney’s challenged conduct, the result of the
15 proceeding in question would have been different. *Id.* at 691-94. The Court defined reasonable
16 probability as “a probability sufficient to undermine confidence in the outcome.” *Id.* at 694.

17 Effective assistance of appellate counsel is guaranteed by the Due Process Clause of
18 the Fourteenth Amendment. *Evitts v. Lucey*, 469 U.S. 387, 391-405 (1985). Claims of ineffective
19 assistance of appellate counsel are reviewed according to *Strickland*’s two-pronged test. *Miller v.*
20 *Keeney*, 882 F.2d 1428, 1433 (9th Cir.1989); *United States v. Birtle*, 792 F.2d 846, 847 (9th
21 Cir.1986); *See, also, Penson v. Ohio*, 488 U.S. 75 (1988) (holding that where a defendant has been
22 actually or constructively denied the assistance of appellate counsel altogether, the *Strickland*
23 standard does not apply and prejudice is presumed; the implication is that *Strickland* does apply
24 where counsel is present but ineffective).

25 To prevail, petitioner must show two things. First, he must establish that appellate
26 counsel's deficient performance fell below an objective standard of reasonableness under prevailing

1 professional norms. *Strickland*, 466 U.S. at 687-88 (1984). Second, petitioner must establish that
2 he suffered prejudice in that there was a reasonable probability that, but for counsel's unprofessional
3 errors, he would have prevailed on appeal. *Id.* at 694.

4 B. Merits Review

5 **Ground One (a)**

6 In this ground for relief, petitioner claims he received ineffective assistance of trial
7 counsel where counsel failed to have the medical evidence reviewed by a doctor before trial in order
8 to discredit the testimony of Nurse Suitor by showing that she had not compared the 1994 exam with
9 the 1999 exam, and where counsel did not investigate and refute the State's expert, Suitor.
10 Petitioner alleges that a Dr. Ricci of the Spurwick Child Abuse Program of Portland, Maine
11 compared the 1994 and 1999 medical reports and concluded the examinations were the same. *See*
12 Exhibit 10 to Petitioner's Reply (docket #110).

13 In presenting a claim of ineffective assistance based on counsel's failure to call
14 witnesses, Petitioner must identify the witness, *U.S. v. Murray*, 751 F.2d 1528, 1535 (9th Cir. 1985),
15 show that the witness was willing to testify, *U.S. v. Harden*, 846 F.2d 1229, 1231-32 (9th Cir. 1988),
16 and show that the witness's testimony would have been sufficient to create a reasonable doubt as to
17 guilt. *Tinsley v. Borg*, 895 F.2d 520, 532 (9th Cir. 1990); *see also United States v. Berry*, 814 F.2d
18 1406, 1409 (9th Cir. 1989) (holding that where defendant did not indicate what witness would have
19 testified to and how such testimony would have changed the outcome of the trial, there can be no
20 ineffective assistance of counsel).

21 Counsel also has "a duty to make reasonable investigations or to make a reasonable
22 decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. Where an
23 attorney has consciously decided not to conduct further investigation because of reasonable tactical
24 evaluations, his or her performance is not constitutionally deficient. *Allen v. Shepard* 2010 WL
25 424323, 5 (E.D.Cal.) (E.D.Cal.,2010).

26 The Nevada Supreme Court's review of this claim resulted in denial of relief, when

1 the court found the petitioner's assertion to be mere speculation as to which witness would be more
2 believable to the jury. The court added:

3 Further, there was evidence supporting the convictions beyond the
4 physical evidence, including the testimony of the victim, a school
5 counselor, and the victim's mother and cousin. In addition, as Dr. Ricci
6 noted, lack of physical evidence does not rule out sexual abuse; thus, had
7 the jury disbelieved the State's expert, it could still have convicted
8 Braunstein on the weight of the other testimony.
9 Exhibit R, p. 3.

10 As respondents note, many decisions made by counsel are strategic in nature. In this
11 instance, counsel attempted to undermine the credibility of the victim based on testimony that she
12 had been sexually abused at the young age of two. If that claim was true, the difference in the two
13 exams was important. *See* Exhibit G, p. 67. Counsel was able to argue that the nurse's report was
14 inconsistent and that her evaluation was wrong because the examinations were different. To bring in
15 testimony such as petitioner suggests Dr. Ricci would offer would not have assisted the defense, as
16 Dr. Ricci admitted there could be sexual abuse without physical evidence. Exhibit R, p.3.

17 The Nevada Supreme Court's determination of this claim was appropriate in its legal
18 and factual analysis. Petitioner is not entitled to relief on this claim.

19 **Ground Two and Ground Three (a)**

20 Ground two is a claim that trial counsel was ineffective when he failed to lodge
21 appropriate trial objections and permitted witnesses to impermissibly vouch for the victim.
22 Petitioner contends that Detective Tanya Wasielewski inappropriately commented on the
23 truthfulness of the victim's report and that witness Nancy Gentis, the victim's school counselor,
24 improperly testified that she felt proud of the victim for having reported the sexual assault.
25 Ground three (a) alleges that appellate counsel was ineffective for failing to raise the claim on direct
26 appeal.

Vouching consists of placing the prestige of the government behind a witness through
personal assurances of the witness's veracity, or suggesting that information not presented to the jury
supports the witness's testimony. *United States v. Molina*, 934 F.2d 1440, 1445 (9th Cir.1991). The

1 statements or conduct of the “government” must be viewed in context. *Id.*

2 The testimony that petitioner finds objectionable is not the type generally referred to
3 in such claims. Here, it is not the prosecutor’s statements which are said to be vouching, rather it is
4 the testimony of other witnesses, including the victim’s school counselor and the investigating
5 officer.

6 The statements of the school counselor, who testified that she told the child she was
7 proud that she had told someone and it was not her fault, is not a statement of vouching. Rather it is
8 a statement of reassurance offered to the child. The Nevada Supreme Court rejected this claim on
9 the basis that counsel had not objected to the testimony and because it did not rise to plain error, it
10 did not warrant review in the absence of an objection. The Nevada Supreme Court’s analysis was
11 not in error under any United States Supreme Court holding. *See e.g., United States v. Frady*, 456
12 U.S. 152, 163 (1982); *United States v. Atkinson*, 297 U.S. 157, 160 (1936).

13 The Nevada Supreme Court found that the testimony by the police detective, did
14 present a case of vouching, in that the detective testified that she believed the child and felt the
15 matter should proceed and the detective could be considered an expert or an agent of the
16 government. The Nevada Supreme Court also found that counsel was not ineffective for failing to
17 object, because “the comment was isolated and defense counsel may not have wanted to draw
18 attention to it” and because, with the other evidence presented, “there was no reasonable probability
19 of a different outcome if counsel had objected,” applying the *Strickland* standard. Exhibit R, p. 4.
20 This analysis is accurate in judging counsel’s actions as strategic.

21 As to ground 3(a), because the court concluded that there was abundant evidence to
22 support the guilty verdict even if the improper comment had not been made by the detective, the
23 performance of appellate counsel in failing to raise the claim on direct appeal is not ineffective.
24 There is no probability that petitioner would have prevailed on appeal with this claim. The state
25 court’s decision considers the facts in context of the trial and draws a proper conclusion as to
26 counsel’s performance. Strategic decision of counsel are within the accepted range of reasonable

1 performance. No relief is warranted as to ground two and ground 3(a)

2 **Ground 3(b)**

3 This claim of ineffective assistance of counsel is premised on trial counsel's
4 perceived failure to object to witness responses on the basis that they were non-responsive and
5 prejudicial. Specifically, petitioner complains, "trial counsel failed to object to detective
6 Wasielewski's non-responsive answers to propounded questions" about the time frame of the alleged
7 sexual assaults.

8 As quoted by petitioner, the detective's response is affirmative followed by an attempt
9 to explain how the time frame might be established based upon the child's recollection of events. He
10 objects to this response because the detective "was not a [sic] expert in the area of child or adult
11 psychology, and not qualified as such to testify, and because the statements were "extremely
12 prejudicial and specifically designed to garner sympathy from the jury." Petition (docket #61) pp. 5-
13 5(a). Detective Wasielewski's testimony is found at Exhibit C, pp. 43-75; *see* specifically, pp. 50-
14 51.

15 A review of the detective's testimony reveals that she provided information about her
16 background and training so as to demonstrate her ability to make the statements that she did about
17 interviewing child victims and establishing a time line based on conversations with the child,
18 including the child's recollections of events close in time to the alleged assault. Such testimony is
19 not based on psychology, but rather, common sense and experience - both of which the detective
20 demonstrated in her testimony. Thus, counsel's decision not to object does not demonstrate that his
21 performance fell below an objective standard of reasonableness.

22 Moreover, counsel was thorough and effective in participating in the witnesses
23 examination, including offering several pertinent objections to the prosecutor's questions, to the
24 admissibility of possible hearsay statements and to statements that counsel argued were irrelevant.
25 Plaintiff has not demonstrated that he suffered prejudice from counsel's performance in the
26 questioning of this witness.

1 The Nevada Supreme Court denied the claim finding that counsel had not been
2 deficient because he elicited specific information about the time frame of the alleged assaults, which
3 information was confirmed by the testimony of other witnesses. This claim is without merit and the
4 state court's decision was proper under 28 U.S.C. § 2254.

5 **Grounds 3(c), 3(d), and 3(g)**

6 These claims assert trial counsel was ineffective for failing to object to the jury
7 instructions related to the defendant's attempts at flight because any evidence of petitioner's attempts
8 to avoid arrest was based on hearsay and appellate counsel was ineffective for failing to raise the
9 claim on direct appeal.

10 This claim, as it relates to trial counsel's performance, is belied by the record, which
11 clearly reflects counsel's objection to the proposed instruction and the trial court's analysis and bases
12 for allowing the instruction to be given. Exhibit F, p. IV-4. Moreover, the Nevada Supreme Court
13 found that there was enough evidence brought at trial to support the flight instruction, thereby
14 defeating any argument that the claim would have been successful on appeal..

15 Grounds 3(c), 3(d), and 3(g) were properly decided by the Nevada Supreme Court.
16 Petitioner has not demonstrated that the decision to deny relief was based upon an unreasonable
17 determination of the facts or a misapplication of federal law. These claims for relief are denied.

18 **Ground 3(i)**

19 In this ground, petitioner alleges his trial counsel was ineffective in failing to preserve
20 for the record the substance and content of certain bench conferences conducted during trial.
21 Petitioner particularly notes a conference which purportedly resulted in one of the jury instructions
22 being changed. Petitioner also complains that counsel should have objected to petitioner's absence
23 when the written judgment was filed and that there was no judge, attorney, reporter or defendant
24 present when the verdict was returned.

25 In addressing this claim, the Nevada Supreme Court concluded that the petitioner had
26 failed to specify how the failure to record the bench conferences prejudiced him, as is required under

1 an ineffective assistance of counsel claim. Exhibit R, p. 6. In his federal petition, petitioner asserts
2 that “because the conferences were not recorded, there is no record as to what transpired.” Petitioner
3 further alleges that he has a right to have all parties present at the instructions to the jury, but as a
4 result of the unrecorded conference, an instruction was changed and delivered to the jury.

5 The claims presented by petitioner does not outline what he believes occurred in the
6 conference, what change was made to the instruction or how any purported change impacted the
7 jury’s deliberations or its verdict. Moreover, the record of trial indicates that the changed instruction
8 was read to the jury in open court with all parties present and that counsel for both sides stipulated to
9 the change, whatever it may have been. *See* Exhibit F, p. 95. Petitioner’s claim is unsupported by
10 the record and it shall be denied. Counsel was not ineffective on the bases raised in this ground 3(i).

11 **Ground 3(j)**

12 Petitioner claims his federal constitutional right to the effective assistance of appellate
13 counsel was violated because “appellate counsel Karen Connolly federalized the petition [and] trial
14 and appellate counsel Drew Christanson did not.” He believes counsel was ineffective in this regard
15 as “federal relief would have been barred.”

16 Petitioner’s claim is unclear. He confirms that his appellate counsel, Connolly, did
17 federalize his claims and his final statement implies a potentiality that may or may not have arisen.
18 The Nevada Supreme Court’s denial of the claim was proper. He has failed to identify for this court
19 what claims were not federalized and to state affirmatively how he was actually prejudiced by
20 appellate counsel’s performance in this regard. Ground 3(j) shall be denied.

21 **Ground 3(k)**

22 Plaintiff claims the district court erred in permitting cumulative hearsay testimony by
23 Gentis and Candito in violation of Nevada State law. Petitioner further alleges that appellate
24 counsel “failed to make appropriate arguments on appeal.”

25 On direct appeal, when this claim was originally raised, the Nevada Supreme Court
26 determined the trial court had erred in not conducting a “trustworthiness hearing,” but, after

1 examining the testimony for its trustworthiness, found its admission to be harmless error. Exhibit K,
2 14.

3 Respondents correctly note that the standard of review for the admission of these
4 hearsay statements is set forth in *Ohio v. Roberts*, 448 U.S. 56 (1980), because the decision on
5 appeal was entered before the United States Supreme Court decided *Crawford v. Washington*, 541
6 U.S. 36 (2004). *Ohio v. Roberts* focuses on indicia of reliability in determining whether an out-of-
7 court statement can be allowed into evidence despite the inability to cross-examine the witness. The
8 *Roberts* court concluded that

9 “[r]eliability can be inferred without more in a case where the evidence
10 falls within a firmly rooted hearsay exception. In other cases, the evidence
11 must be excluded, at least absent a showing of particularized guarantees of
trustworthiness.”

12 448 U.S. at 66. Thus, the Nevada Supreme Court’s analysis of the trial court’s admittance of the
13 hearsay testimony was correct. The victim’s statements to the testifying witnesses were made
14 voluntarily, and were consistent with each other. Moreover, the statements offered through Gentis
15 and Candito were consistent with the victim’s own testimony at trial. The mental and emotional
16 state of the victim when revealing the petitioner’s actions to Gentis and Candito were appropriate to
17 the facts being revealed. Thus, the statement could be judged to be truthful and the trial court did
18 not err in admitting the hearsay testimony.

19 Petitioner has not demonstrated how appellate counsel’s performance was deficient
20 under *Strickland* in failing to make “appropriate arguments on appeal.” Petitioner contends that
21 counsel should have argued the testimony was cumulate and violated petitioner’s Fifth and
22 Fourteenth Amendment rights. The types of arguments to present on appeal and how they should be
23 framed is the sole purview of the attorney as a matter of strategy. Strategic decisions of counsel shall
24 not be second-guessed by the court. *Strickland*, 466 U.S. at 689. Ground 3(k) is without merit and
25 shall be denied.

1 **Ground 3(m)**

2 This is a claim that petitioner suffered a due process violation in the introduction of
3 prior bad act evidence. Under Nevada law and the Federal Rules of Evidence, it is improper to
4 admit evidence of prior bad acts except in limited circumstances. Bad acts evidence is never
5 properly admitted to show the defendant has a propensity to a criminal behavior or a bad character.
6 *See* NRS 48.045(2); F.R.E. 404(b).

7 The claim was considered and rejected by the Nevada Supreme Court on direct
8 appeal. Exhibit K, p. 5. Respondents assert that the Nevada Supreme Court's handling of the claim
9 cannot be the subject of review under 28 U.S.C. § 2254 because there is no United States Supreme
10 Court's law holding that the admission of propensity evidence violates due process, citing *Alberni v.*
11 *McDaniel*, 458 F.3d 860 (9th Cir. 2006).² Very recently, the Ninth Circuit confirmed this point in
12 *DeCesare v. Hornbeak*, 2010 WL 22193565, E.D. Cal, 2010 (June 2, 2010), again referencing the
13 United States Supreme Court statement in *Estelle v. McGuire*. "Because we need not reach this
14 issue, we express no opinion on whether a state law would violate the Due Process Clause if it
15 permitted the use of 'prior crimes' evidence to show propensity to commit a charged crime." *Estelle*,
16 501 U.S. 62, 75, n. 5 (1991).

17 Because this court is constrained by the provisions of the AEDPA, which requires a
18 showing that the state court's decision was contrary to or an unreasonable application of clearly
19 established federal law as determined by the United States Supreme Court, and because that Court
20 has so clearly indicated it has not made such a determination. No relief is available for petitioner
21 from this court.

22 **III. Summary Judgment and Motion for Counsel**

23 Petitioner's motion for summary judgment is improper and moot. The court has
24

25 ² Petitioner suggests that *Alberni* should not apply to his case, mentioning "*ex post facto*" without
26 discussion or explanation. If it were applicable to the facts here, the *ex post facto* argument would fail
because *Estelle* was decided in 1991, before his conviction was final.

1 considered the merits of his claims and the reiterations of claims or arguments offering additional
2 arguments is not persuasive. Moreover, the motion for appointment of counsel shall be denied as the
3 matter is fully briefed and decided herein.

4 **IV. Conclusion**

5 Petitioner is not entitled to relief on the surviving claims of his petition. He has failed
6 to demonstrate that the state supreme court's review of his claims was in error under 28 U.S.C.
7 §2254.

8 **V. Certificate of Appealability**

9 In order to proceed with his appeal, petitioner must receive a certificate of
10 appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435
11 F.3d 946, 950-951 (9th Cir. 2006); *see also United States v. Mikels*, 236 F.3d 550, 551-52 (9th Cir.
12 2001). Generally, a petitioner must make "a substantial showing of the denial of a constitutional
13 right" to warrant a certificate of appealability. *Id.*; 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529
14 U.S. 473, 483-84 (2000). "The petitioner must demonstrate that reasonable jurists would find the
15 district court's assessment of the constitutional claims debatable or wrong." *Id.* (quoting *Slack*, 529
16 U.S. at 484). In order to meet this threshold inquiry, the petitioner has the burden of demonstrating
17 that the issues are debatable among jurists of reason; that a court could resolve the issues differently;
18 or that the questions are adequate to deserve encouragement to proceed further. *Id.*

19 Pursuant to the December 1, 2009 amendment to Rule 11 of the Rules Governing
20 Section 2254 and 2255 Cases, district courts are required to rule on the certificate of appealability in
21 the order disposing of a proceeding adversely to the petitioner or movant, rather than waiting for a
22 notice of appeal and request for certificate of appealability to be filed. Rule 11(a). This Court has
23 considered the issues raised by petitioner, with respect to whether they satisfy the standard for
24 issuance of a certificate of appealability, and determines that none meet that standard. The Court
25 will therefore deny petitioner a certificate of appealability.

26 **IT IS THEREFORE ORDERED** that the second amended petition for writ of

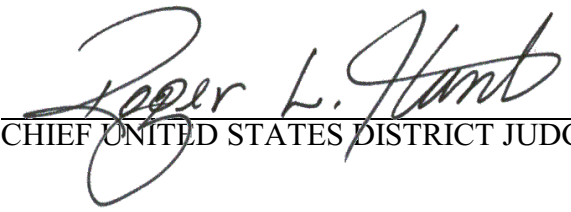
1 habeas corpus pursuant to 28 U.S.C. § 2254 (docket #61) is **DENIED**.

2 **IT IS FURTHER ORDERED** that the motion for appointment of counsel (docket
3 #109) and the Motion for Summary Judgment (docket #113) are **DENIED**.

4 **IT IS FURTHER ORDERED** that petitioner is denied a certificate of appealability.

5 The clerk shall enter judgment accordingly.

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7 DATED this 6th day of July, 2010

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11 CHIEF UNITED STATES DISTRICT JUDGE
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